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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS AMOCO PRODUCTION COMPANY, *ET AL.*

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I.

A. In their efforts to obscure the Ninth Circuit's refusal in *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (1985) (*Gambell II*) (Petn. A23), to follow the teachings of this Court in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), respondents contend that the preliminary injunction commanded by the Ninth Circuit was in fact "requested" by petitioners. (Opp. 18). In support of this assertion, respondents cite a passage from *Gambell II*, 774 F.2d at 1417 (Petn. A25), quoting from the industry-defendants' brief in *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*). However, as recognized in *Gambell*

II, the industry defendants represented to the court in *Gambell II* that an injunction pending compliance with ANILCA would be appropriate only " 'if irreparable harm is shown,' " specifically citing *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305. *See* 774 F.2d at 1417 (Petn. A25).

Since petitioners explicitly preserved the position in *Gambell I* that respondents must show irreparable harm to obtain an injunction, respondents' argument that we requested an injunction in *Gambell II* is obviously wrong.

B. As a further effort to avoid the *Weinberger* issue, respondents argue that the Ninth Circuit did not rely on a *per se* injunction rule in *Gambell II*. This contention asks this Court to ignore what the Ninth Circuit did, as well as what it said.[1]

On remand from *Gambell I*, the district court in this case followed the approach directed by *Weinberger*. After reviewing the environmental impact statement prepared in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), analyses prepared under the Endangered Species Act (ESA), 16 U.S.C. § 1536(b)(3)(A), and the OCS Lands Act (OCSLA), 43 U.S.C. § 1331, and an explicit ANILCA evaluation for Sale No. 57 prepared in the aftermath of the Ninth Circuit's ruling in *Gambell I*, which concluded that neither Sale No. 57 leasing nor exploration would cause significant subsistence restrictions, the court decided that exploration in the Sale No. 57 region should not be preliminarily enjoined because "exploration will not significantly restrict subsist-

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[1] Respondents quote at length from a portion of *Gambell II* which sets forth the "traditional test" for injunctive relief (Opp. 20). As is clear from the later portions of its opinion (A36-42), however, the court of appeals undertook no balancing of relative hardships to the parties, finding the district court's balancing to be "an error of law." (A42). Indeed, the Ninth Circuit believed *Weinberger's* command that courts must balance hardships applicable only to cases brought under the Clean Water Act. (A42 n.2).

ence resources." (Petn. A62-A63).[2] It found further that there was ample opportunity to protect subsistence prior to the production stage when adverse impacts might occur and that an injunction would interfere with ongoing exploration. (A63).[3]

The *Gambell II* court reversed, stating that "the Ninth Circuit rule [is] that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" (A38)—*i.e.*, that the injunction would harm the environment or interfere with the performance of long-term contracts. (A40). Accordingly, the Ninth Circuit by both its words and its actions made clear that it reversed the district court's denial of an injunction precisely *because* that court had balanced the equities as required by *Weinberger*.

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[2] The consideration given to subsistence issues by virtue of Interior's compliance with NEPA and other environmental statutes, as well as its post-sale ANILCA evaluation for Sale No. 57, belies respondents' argument that their subsistence needs have been "virtually ignored." (Opp. 14).

[3] Respondents make the remarkable claim that the district court denied the injunction which they requested "without explaining or elucidating its reasoning or rationale, and without expressly balancing the equities. . . ." (Opp. 12). In doing so, they simply ignore the district court's explicit findings that exploration would not harm them.

They also assert that "neither Interior nor the oil companies offered any evidence indicating they would suffer irreparable harm if the injunction issued. . . ." (Opp. 20). Again, they ignore the record, as accurately summarized by the dissenting judge below:

> "[A]ppellees presented evidence which showed that they would have suffered irreparable harm if a preliminary injunction had been issued. At the time the district court was deciding whether to enter a preliminary injunction, Exxon, Amoco, and ARCO had committed almost $70 million in support of their plans to explore Lease Tracts Nos. 57 and 83 during the summer of 1985. If the trial court had enjoined their exploration activities, their money would have been lost. The permanent lost of $70 million constitutes substantial irreparable harm." 774 F.2d at 1430 (Petn. A51).

II.

A. Respondents' characterization of the issue of ANILCA's application to the OCS as "a tempest in a teacup" is ludicrous. Two OCS lease sales, involving bonus bids of more than $800 million and exploration expenditures of over $100 million, have been indefinitely enjoined because of purported violations of ANILCA.[4]

Moreover, the Ninth Circuit has recently affirmed, solely on the basis of *Gambell II*, still another injunction against an OCS Sale. *See Village of Akutan* v. *Hodel*, Nos. 86-3512, *et al.* (9th Cir., filed April 28, 1986) (reprinted in the Appendix hereto), holding that any prospect of significant subsistence restrictions during an OCS project, even if unlikely and even if associated only with the final production stage of the project, requires immediate leasing-stage compliance with ANILCA's requirements for notice, hearings and findings.[5]

Respondents are thus forced to recognize that compliance with ANILCA "will concededly change the contours of some OCS lease sales. . ., delay OCS leasing in Alaska. . . . [and] may prohibit some unnecessary lease

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[4] Respondents, without any record support, contend that further exploration in the Sale Nos. 57 and 83 areas is unimportant because initial exploration has been unsuccessful. Even were they correct in making this assertion, an initial season of unsuccessful exploration would not support the conclusion that the companies are not interested in conducting further exploration in those areas.

[5] In depreciating the significance of the ANILCA issue tendered by petitioners, respondents argue that the statute is "fairly short and straight-forward" (Opp. 13) and contend that "Interior has proven that it can comply with [ANILCA] when it wishes" (Opp. 14). This argument ignores the *Akutan* case, where the Department did prepare, prior to a lease sale, a complete ANILCA evaluation, which concluded that leasing, exploration, and production/development were all "unlikely" to cause significant restrictions of subsistence.

sales." (Opp. 13). Respondents' attempt to dismiss these consequences as "relatively insignificant" (Opp. 14) ignores the congressional purpose in the OCSLA "to 'promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf. . . .' " *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981) (citations omitted).

B. Respondents argue that petitioners cannot obtain review of the Ninth Circuit's conclusion in *Gambell I* that ANILCA applies to OCS leasing because they did not relitigate that issue in *Gambell II*.

As respondents reluctantly acknowledge (Opp. 16 n.30), however, industry-petitioners specifically reserved the argument in *Gambell II* that *Gambell I* was wrongly decided. Such a reservation of their position on the issue represented a sensible way to remind the Ninth Circuit of petitioners' continuing disagreement with *Gambell I* without wasting both the parties' and the court's efforts in a futile effort to reargue the issues decided in *Gambell I*.

That such an effort would have been futile flows from the Ninth Circuit's view of the "law of the case" doctrine:

> "The 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case." *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982) (citations omitted).

See also Kimball v. *Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979).

The "law of the case" doctrine does not, however, bar later litigation of the issue at a higher appellate level. *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); 18 Wright, Miller, *et al.*, Federal Practice and Procedure § 4478, p. 801 (1981).[6] Moreover, the law is clear that

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[6] None of the decisions cited by Respondents (Opp. 17) establish the

defendants were not obliged to seek certiorari from the interlocutory decision in Gambell I, but instead could raise the ANILCA issue decided there following the further definition in *Gambell II* of the contours of the ANILCA obligation as it applies to the OCS. *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964). *See generally* Amoco Production Co., *et al.*, Opposition to Cross-Petition in No. 85-1608, at pp. 8-9.

C. Respondents' "Statement of the Case" serves as their argument that ANILCA should apply to OCS leasing.

First, respondents contend that ANILCA's protection of subsistence represents a final "settlement" of the hunting and fishing rights which were extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (ANCSA). (Opp. 2). However, respondents themselves concede that, in extinguishing hunting and fishing rights, ANCSA itself afforded Native Americans

> "three major forms of compensation: Monetary settlement, rights to future payments from oil and gas and mineral leases and 40 million acres of unallocated federal lands." (Opp. 6).

The monetary payment received by Native Americans under ANCSA was nearly $1 billion, 43 U.S.C. § 1605(a), (c),

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proposition that a party who loses an issue on an initial appeal to a court of appeals must continue to relitigate that issue before it can seek review of that issue in the Supreme Court. The "unbroken string of decisions" (Opp. 17) referred to by respondents establishes only that petitioner must have litigated the issues in its petition in the court of appeals at some point before seeking review in this Court. For example, in *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973), the Court denied certiorari when the petitioners first sought review, but granted certiorari after the court of appeals affirmed entry of judgment. There is no indication in the Court's opinion that the petitioners relitigated the issues previously decided against them on their first appeal.

and even respondents characterize the ANCSA settlement as "generous." (Opp. 7).

ANILCA was not, therefore, designed to be a *quid pro quo* for the title extinguishment of ANCSA and was not designed to follow the contours of the earlier Act. Indeed, while ANCSA extinguished only Native claims, ANILCA was carefully drafted to extend its benefits to all persons, Native and non-Native. (Petn. 19-20).[7]

Respondents' second claim is that "the Eskimo treat the ice as a mere extension of land" upon which they build roads, set up camps and hunt and fish (Opp. 2), so that ANILCA cannot sensibly be limited to lands that lie within the State of Alaska, but instead must also apply to the OCS. However, as we demonstrated in our petition (pp. 16-17), Section 810 of ANILCA applies only to "public lands" in Alaska, 16 U.S.C. § 3120(a), which are in turn defined as "lands, the title to which is in the United States. . .," 16 U.S.C. § 3102(2). As we also demonstrated in our petition, the United States does not assert "title" to any part of the OCS.[8]

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[7] Respondents allege, without citation, that before the *Gambell I* suit was filed the oil companies contended in *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ___U.S. ___, 106 S.Ct. 68 (1985), that "it was 'clear and unambiguous' that the phrase 'in Alaska' referred to a geographic area lying between the high tide mark and the two hundred mile limit." The allegation is false. In *Inupiat Community*, the oil companies argued in the district court, *inter alia*, that Section 4(b) of ANCSA extinguished aboriginal title (if any existed, which was denied) to the OCS, *despite* the use of the phrase "in Alaska," because the legislative history demonstrated congressional intent to settle all aboriginal claims of Alaskan Natives. Memorandum in Support of Motion of Defendants Amoco Production Co., *et al.*, for Judgment on the Pleadings, pp. 106-14. In the Ninth Circuit, the oil companies' only ANCSA argument was that Section 4(c), which extinguished "claims . . . that are based on [aboriginal claims] in Alaska," extinguished claims outside as well as inside Alaska, because the former were based on the latter. Brief of Appellees Amoco Production Co., in *Inupiat Community, et al.*, pp. 43-46.

[8] Congressional recognition of this principle has come to our attention

Respondents' claim that OCS ice and waters are mere extensions of Alaska's land does not even attempt to come to grips with this argument. While Native Alaskans doubtless do conduct subsistence activities on the high seas and on the ice during winter, it is quite clear that the United States does not assert title to these areas. Since ANILCA is limited to protecting subsistence "on the public lands," 16 U.S.C. §§ 3111(1)-(5); 3120, it clearly does not extend to activities on the OCS.

D. Respondents miss the point of our argument that, if ANILCA applies to the OCS, the Ninth Circuit improperly ignored the distinct stages of the OCS leasing process. Their observation that *Secretary of the Interior v. California*, 464 U.S. 312 (1984), did not interpret ANILCA is irrelevant. *Secretary of the Interior* establishes that the four-stage process of OCS leasing and development incorporated into OCSLA must be considered when applying any statute to the early stages of OCS leasing. *See id.* at 341.

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since the filing of our petition. In H.R. Rep. No. 99-300, 99th Cong., 1st Sess., p. 591 (Oct. 3, 1985), the House Merchant Marine and Fisheries Committee discussed the term "public lands" as it has "enjoy[ed] two centuries of well-established meaning [and] has been used by the Congress and interpreted by the Supreme Court." The Committee recognized that "[t]wo fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability to sell or otherwise dispose of it." *Id.* The Committee concluded, for exactly the same reasons recited in our petition, that

> " '[t]he U.S. does not hold title to the OCS, nor is the OCS subject to 'sale or other disposition under general laws.' As opposed to full dominion and control, the U.S. has claimed only limited sovereignty over the exploration and development of natural resources on and within the OCS. The U.S. in no way exercises title to or sovereignty over the area itself. Except for the resources-related claims of jurisdiction over the fisheries and mineral deposits of the OCS, the area is international and beyond U.S. control, as recently reiterated by the President's Exclusive Economic Zone Proclamation." *Id.* at 591-92.

E. Respondents argue that the mere filing of their complaint established a *lis pendens*, thus justifying a retroactive application of the Ninth Circuit's holding that ANILCA applies to the OCS. This argument is inconsistent with the decisions cited in the Petition (Petn. 25 n.26), in which this Court expressly refused to apply novel constructions of particular statutes back to the dates when the complaints asserting those theories were initially filed.[9]

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[9] For example, in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), plaintiffs brought their claim in 1972 alleging that defendants were illegally deducting larger pension contributions from the paychecks of female than from those of male employees. The lower courts agreed, and enjoined the practice in 1975. Although agreeing that the withholding practice was unlawful, the Court held that the lower courts erred in ordering refunds of excess contributions for the years 1973 through 1975, even though the contributions were made after the complaint was filed

CONCLUSION

For the reasons recited above and in the petition, this Court should grant a writ of certiorari and set this case for plenary argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

DC Nos. CV-A85-701-V
CV-J85-037-V
CV-J85-038-V

TRIBAL VILLAGE OF AKUTAN, *et al.*,
Plaintiffs-Appellees,

vs.

DONALD P. HODEL, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

MEMORANDUM*

Argued and Submitted March 14, 1986

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

In this consolidated appeal, appellants Secretary of the Interior, ten oil cbmpanies, and others, seek review of a district court order granting a preliminary injunction restraining the Secretary from proceeding with Lease Sale 92 in the North Aleutian Basin. We affirm.

I. BACKGROUND

Lease Sale 92 is proposed as part of the Department of Interior's current five-year offshore oil and gas leasing program, established under section 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344. In preparing for the Sale, the Secretary was required to conduct an evaluation of the effects of the sale on subsistence uses and resources pursuant to section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 1320(a). Section 810(a) can be described as consisting of two tiers, the first requiring an evaluation, and the second, under the appropriate circumstances, requiring notice, hearings, and minimization of adverse impact upon subsistence uses and resources.

The Secretary conducted an evaluation pursuant to the first tier of section 810(a), but, based on his finding that significant subsistence restrictions were "unlikely," declined to undertake the second tier procedures of noticed hearings and mitigation of environmental harm.

Following the Secretary's announcement in December 1985, of his decision to go forward with Lease Sale 92, appellees the State of Alaska, Trustees for Alaska, the Tribal Village of Akutan, and others, filed suit in federal district court. The parties sought a preliminary injunction against the receipt and opening of bids based on violations of ANILCA and other statutes.[1]

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[1] Appellants alleged violations of section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

On January 13, 1986, the district court enjoined the Secretary from proceeding with the bidding process in Lease Sale 92. Invoking two recent Ninth Circuit decisions construing ANILCA, the court concluded that the Secretary had applied an incorrect legal standard in determining his duties under section 810(a) and accordingly had failed to comply with the notice and hearing requirements in section 810(a)(1)-(3). Specifically, the court held that, notwithstanding the Secretary's finding that subsistence restrictions were unlikely, where a proposed action "may significantly restrict subsistence uses," the Secretary is required to proceed with notice and hearing under the second tier of section 810(a). Memorandum and Order at 2-3, *citing People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984). The district court concluded that appellants had established a strong likelihood of success on their ANILCA claim, and that an injunction was required as a matter of course under *Gambell II*, 774 F.2d at 1422-26. Having granted a preliminary injunction based on appellants' ANILCA claim, the court declined to address the other alleged statutory violations.

II. STANDARD OF REVIEW

Our review of a ruling on a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court," *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982), and will be reversed only for an abuse of discretion or if the decision is based on an erroneous legal standard. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

"To obtain a preliminary injunction, a party must show either 1) a likelihood of success on the merits and the

possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Apple Computer,* 725 F.2d at 523. Absent unusual circumstances, irreparable damage is presumed and in injunction is required when an agency violates ANILCA section 810(a). *Gambell II,* 774 F.2d at 1422-23.

Because the preliminary injunction rested solely on the district court's interpretation of section 810(a), our review is, as a practical matter, *de novo.*

III. DISCUSSION

The central issue before us can be simply framed: When do the notice and hearing requirements under ANILCA section 810(a) apply? Must the Secretary find that a proposed action "*would* significantly restrict subsistence uses?" 16 U.S.C. § 3120(a) (emphasis added). Or is a finding that significant restrictions "*may*" result sufficient, even though such restrictions are deemed unlikely?

The Secretary contends that a finding that a proposed action "would" significantly restrict subsistence uses is required to trigger section 810(a)(1)-(3) notice and hearing procedures. He offers the following arguments in support of his construction: 1) this court's decisions in *Kunaknana* and *Gambell II* do not require compliance with section 810(a)(1)-(3) absent a likelihood of significant restrictions upon subsistence resources, and 2) the Secretary's construction is required by the plain language of the statute and is entitled to judicial deference. We consider these arguments in turn.

A. Kunaknana and Gambell II.

In *Kunaknana v. Clark,* 742 F.2d 1145 (9th Cir. 1984), we read section 810(a) as requiring notice and public hearings "if the agency first concludes that the contemplated action *may* significantly restrict subsistence uses." *Id.* at 1151 (emphasis added).

> The inference to be drawn from [the phrase "which would significantly restrict subsistence uses"] is that Congress intended a two-step process: first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearing procedures. This construction of the statute is a reasonable one, relying on the plain meaning of the words of the statute.

Id.

Although the *Kunaknana* court was not called upon specifically to decide when section 810(a)(1)-(3) procedures would be required, its analysis has subsequently formed the basis for a holding in this circuit.

In *People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414 (9th Cir. 1985), the Secretary's section 810(a) evaluation indicated that development and production of the proposed lease sale "may significantly restrict subsistence uses in certain areas." *Id.* at 1422. The court held that under *Kunaknana* the Secretary's finding required that he proceed with the notice and hearing procedures under section 810(a)(1)-(3). *Id.*

Moreover, the argument that the Secretary makes here was presented in nearly identical form to the *Gambell II* court:

> Interior has interpreted the language of Section 810 to require a likelihood of a significant restriction to be evident before the procedures of Subsections 810(a)(1)-(3) come into play. Thus, it found here that "given the low probability that oil will be found, these possible restrictions [at the production stage] are not likely to occur, even locally, as a result of the sale". . . . It also found that significant restrictions on subsistence at the exploration stage "are not likely* * *". . . .

Supp. ER, Vol. II, Ex. 10, CR 32.

The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistence restrictions, and, on findings not meaningfully different than those here, concluded that the Secretary was required to comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

B. Plain Language and Deference to Agency Interpretation

The Secretary next urges that his interpretation of section 810(a)(1)-(3) is required by the plain language of the provision, and, as an agency's interpretation of a statute it is charged with administering, is entitled to a high degree of judicial deference and must be upheld unless unreasonable. Both these arguments might be compelling in the abstract, but because we consider *Gambell II* plainly controlling, they do not alter our conclusion that compliance with section 810(a)(1)-(3) procedures is required before the Secretary may proceed with Lease Sale 92. *See Cubanski, etc. v. Heckler*, No. 85-7123, slip op. at 7, (9th Cir. March 6, 1986) (courts are the final authorities on issues of statutory construction).

CONCLUSION

The district court applied the correct legal standard in concluding that the Secretary must comply with the notice and hearing procedures in ANILCA section 810(a)(1)-(3) when he finds that significant restrictions on subsistence uses are "unlikely." Having identified a probable ANILCA violation, the court did not abuse its discretion in granting a preliminary injunction.